Supreme Court, U.S.
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No. 92-1245

# In the Supreme Court of the United States

OCTOBER TERM, 1992

VASILIOS ANAGNOSTOU, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether preindictment delay deprived petitioner of due process.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 974 F.2d 939.

### JURISDICTION

The judgment of the court of appeals was entered on September 10, 1992. A petition for rehearing was denied on October 27, 1992. Pet. App. 14a-15a. The petition for a writ of certiorari was filed on January 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of destroying a building engaged in interstate commerce by means of an explosive device, in violation of 18 U.S.C. 844(i), and on one count of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 36 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-13a.

1. The evidence at trial showed that petitioner destroyed his restaurant by means of an explosive device, and that he used the mails in an effort to collect insurance proceeds.

Petitioner owned and operated a restaurant in Mount Prospect, Illinois, from 1977 to 1985. On November 25, 1985, petitioner asked Peter Anthony, a friend and customer, to look at the gas stove in his restaurant. Anthony said the flex pipe on the back of the stove appeared to be old, and he replaced it. He did not disconnect any other pipe or valve. Pet. App. 2a-3a. The cook used the stove later that day without incident, and no one smelled a gas leak. The staff left the restaurant at 10 p.m., and petitioner closed the restaurant within a half hour. *Ibid.*

Two hours later, an explosion destroyed the restaurant. Upon investigating the incident, local and federal authorities determined that the stove had been moved away from the wall and that the natural gas shut-off valve had been removed from the main gas line behind the stove. Pet. App. 2a. The markings left by the tool used to disconnect the gas line did not match Anthony's tools. The investigators interviewed Anthony, who explained the repairs he had made and said that he had not removed the shut-off valve.

Other evidence showed that petitioner's insurance was to expire on December 1, 1985, that his business and personal finances were suffering, and that he had sent employees home early that night without performing some routine maintenance tasks. Pet. App. 3a, 9a.

2. Petitioner was indicted on November 14, 1990, almost five years after the explosion. Anthony died one month after the indictment was returned. Pet. App. 3a. Prior to trial, petitioner moved to dismiss the indictment on the ground of preindictment delay, arguing that the delay deprived him of Anthony's testimony and that his testimony would have exonerated petitioner. The district court denied the motion.

The court of appeals noted that preindictment delay violates due process only if the delay caused actual and substantial prejudice to the defendant and the government delayed the indictment for the purpose of gaining a tactical advantage or for some other impermissible reason. Pet. App. 4a. The court of appeals found that petitioner's claim failed to meet the first prong of that test, because there was "no evidence to suggest that Anthony would have said anything [at trial] different from what he told investigators before his death[.]" Pet. App. 6a. The court further observed that Anthony's absence arguably aided petitioner, because petitioner was able to speculate at trial and in closing argument that Anthony's negligence might have caused the explosion. *Ibid.*

Moreover, there was no evidence, and petitioner did not contend, that the government intentionally delayed bringing the indictment to gain some tactical

advantage. Pet. App. 6a. The court noted that the delay was caused by a heavy workload in the U.S. Attorney's Office, which resulted in reassignment of the case from one prosecutor to another. While the court viewed that as "hardly a compelling justification" for the delay, the court found no bad faith on the part of the government. Pet. App. 7a.

## ARGUMENT

Petitioner contends (Pet. 4-22) that the court of appeals erred in concluding that the preindictment delay did not substantially prejudice him.

In *United States* v. *Marion*, 404 U.S. 307, 324 (1971), this Court noted that preindictment delay does not violate due process unless the delay caused "substantial prejudice" to the defendant's "rights to a fair trial," and was "an intentional device used to gain tactical advantage over the accused." In *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977), the Court noted that actual prejudice was a necessary, but not a sufficient, condition to a valid claim that preindictment delay violated due process. The defendant must also show that the delay was motivated by an effort to gain a "tactical" advantage or was the product of "recklessness." *Id.* at 795 & n.17.

In this case, the lower courts correctly concluded that petitioner was not prejudiced by the delay. Petitioner speculates (Pet. 6, 10, 21) that Anthony's testimony might have exonerated him. As the court of appeals observed, however, there is no reason to think that his testimony would have been inconsistent with what he told investigators at the time of the accident. Anthony told the authorities that he had never touched the gas valve, that he had tested for

gas leakage after replacing the flex pipe, and that he had not smelled any odor of gas after completing his work. Pet. App. 6a. Moreover, the physical evidence was inconsistent with petitioner's theory of how the explosion occurred, namely that Anthony made a mistake in repairing the stove. Pet. App. 10a. Finally, the court of appeals was correct in noting that Anthony's absence may have helped petitioner, because petitioner was able to speculate at trial that Anthony had failed properly to repair the stove—speculation that was directly at odds with Anthony's statements to the authorities. Pet. App. 6a.[1]

Petitioner argues (Pet. 14) that the courts of appeals are in conflict on whether the prejudice suffered by a defendant is to be balanced against the reasons for the delay, or whether a defendant must also show improper prosecutorial motive for the delay. See *Hoo* v. *United States*, 484 U.S. 1035, 1036 (1988) (White, J., dissenting from denial of certiorari). Regardless of whether the circuits are in conflict on that issue, review in this case is unwarranted. Both courts below correctly concluded that petitioner suffered no prejudice from the delay. On any view, a defendant claiming excessive preindictment delay must make a showing of actual prejudice. Review is therefore unwarranted.

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[1] The court of appeals was also correct in concluding that the delay here, while not to be condoned, was not the product of bad faith. "Here, the sequence of events makes it impossible to conclude that the government purposely delayed the indictment to capitalize on the alleged prejudice (*i.e.*, Anthony's death)." Pet. App. 7a. Thus, even if petitioner were correct that he was prejudiced by the delay, his claim would nonetheless fail.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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